

**BEFORE THE DIRECTOR OF THE  
DEPARTMENT OF PESTICIDE REGULATION  
STATE OF CALIFORNIA**

In the Matter of the Decision of  
the Agricultural Commissioner of  
the County of Monterey  
(County File No. 1270608)

Administrative Docket No. 138

**DECISION**

Ted Ohlmer  
1155 Monarch Lane Apt. #27  
Pacific Grove, CA 93950

Appellant /

**Procedural Background**

Under Food and Agricultural Code (FAC) section 12999.5 and California Code of Regulations (CCR), title 3, section 6130, county agricultural commissioners (CACs) may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Monterey CAC found that the appellant, Ted Ohlmer, a licensed aerial applicator, committed one violation of the State's pesticide laws and regulations pertaining to title 3, section 6614(b)(1). The commissioner imposed a penalty of \$2,500 for the violation.<sup>1</sup>

Ted Ohlmer appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). The Director has jurisdiction in the appeal under FAC section 12999.5.

**Standard of Review**

The Director decides matters of law using her independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Director decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision. The Director notes that witnesses sometimes present contradictory

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<sup>1</sup> The County issued two NOPAs, county file number 1270608 naming Ted Ohlmer as respondent, county file number 1270609 naming Soil Serve as respondent and proposed to fine each respondent the sum of \$2,500.00. The hearing held on July 17, 2006 combined the two NOPAs and the hearing officer found the CAC's levy of a fine against both respondents appropriate. The Director received an appeal of the CAC's Decision and Order only as to Ted Ohlmer. Therefore, the Director will not address the fine levied against Soil Serv, which became effective 30 days after Soil Serv received the decision.

testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision.

### **Factual Background**

On May 4, 2005, licensed aerial applicator Ted Ohlmer, while in the employ of Soil Serv, Inc., sprayed a mixture of pesticides on Lot 3 of Guidotti Brothers' Lanini Ranch in Soledad, California by helicopter. There were two tractor drivers working in an adjacent field (Lot 4 Anderson Ranch Costa Farms, Inc.); one tractor driver was sprayed with the mixture of pesticides and experienced burning and irritation of his eyes. The tractor driver, Ernesto Valdez Hernandez sought medical treatment the same day and was treated for corneal abrasion/burn in the left eye and conjunctivitis in his right eye.

### **Relevant Statute and Regulation**

Title 3, Section 6614(b)(1) reads: (b) Notwithstanding that substantial drift will be prevented, no pesticide application shall be made or continued when: (1) There is a reasonable possibility of contamination of the bodies or clothing of persons not involved in the application process.

When levying fines, the CAC must follow the fine guidelines in CCR, title 3, section 6130. Under section 6130, violations shall be designated as "Class A," "Class B," and "Class C." A "Class A" violation is one which created an actual health or environmental hazard; is a violation of a lawful order of the CAC issued pursuant to FAC sections 11737, 11737.5, 11896, or 11897; or is a violation that is a repeat Class B violation. The fine range for Class A violations is \$700-\$5,000. A "Class B" violation is one that posed a reasonable possibility of creating a health or environmental effect, or is a violation that is a repeat Class C violation. The fine range for Class B violations is \$250-\$1,000. A "Class C" violation is one that is not defined in either Class A or Class B. The fine range for Class C violations is \$50-\$400.

### **Appellant's Allegations**

Appellant alleges that the hearing officer was a law student without agricultural experience. He alleges that there is no evidence of any contamination of Mr. Valdez, his clothing, the tractor or his surroundings. Appellant alleges he was not allowed to question the doctor who treated Mr. Valdez. Appellant appears to object to the hearing officer's conclusion that Mr. Valdez had no notice of the spraying and proffers the question as to why Mr. Valdez would drive toward the helicopter. Appellant also objects to the hearing officer's consideration of Mr. Ohlmer's interest in avoiding the fine in making a determination of Mr. Ohlmer's credibility. Appellant also asserts that the County presented no evidence that "we" failed to take all precautions or that anything was wrong with 'our' procedures.

### **The Hearing Officer's Decision**

The Hearing Officer determined that the witnesses Caitlin Lewis, CAC biologist, and Ernest Valdez Hernandez, tractor driver, testified credibly. He also determined, even though Mr. Ohlmer had an interest in avoiding the fine, that Mr. Ohlmer's testimony was also credible. The Director is bound by these determinations.

The Hearing Officer made six findings of fact. The Hearing Officer determined that Charles Rule, Soil Serv's ground coordinator, failed to inform Mr. Valdez that the helicopter was spraying two lots adjacent to where he was working, failed to inform the helicopter pilot that two tractor drivers were working adjacently, and determined that the helicopter pilot was aware that tractors were working in adjacent fields. The Hearing Officer found that the wind direction was blowing in a direction consistent with spray mist from the helicopter contacting Mr. Valdez. Lastly, the Hearing Officer found that Mr. Valdez and Mr. Ohlmer were working close enough together for there to be a reasonable possibility of contamination and that Mr. Valdez was contacted by spray mist coming from Mr. Ohlmer's helicopter.

The Hearing Officer explained that a violation of 3 CCR section 6614(b)(1) occurs where there is a *reasonable possibility* of contamination of the bodies or clothing of person not involved in the spraying. Although there was some conflict in the wind direction testimony, the Hearing Officer felt that both wind directions supported the possibility that the spray mist would move toward Mr. Valdez' location, again creating a reasonable possibility of contamination. Mr. Valdez' testimony was found to support this conclusion.

The Hearing Officer upheld the CAC's issuance of a fine of \$2,500, a Class A fine against Ted Ohlmer, because an actual health hazard occurred.

### **The Director's Analysis**

The Appellant alleged that the Hearing Officer was a law student without agricultural

experience. The inference was that the Hearing Officer was incompetent. At the beginning of the hearing, the Hearing Officer asked the parties if anyone had any objections to him hearing the case. The parties, including Mr. Ohlmer, replied no. There was no support for this allegation offered by Mr. Ohlmer. The Director finds the assertion to be without merit.

Mr. Ohlmer also inferred that the tractor driver knew the helicopter was spraying, because he circled the field to signal to the tractor drivers that he was spraying, and that the tractor driver drove to an area adjacent to the spraying. Mr. Ohlmer testified that he always signals to tractor drivers and the tractor drivers wait until he is done spraying to continue their work. Mr. Ohlmer admitted seeing the tractors working in adjacent fields but denied seeing the tractor when it was working at the nearest location to his spraying. Mr. Valdez testified that he was sprayed when the helicopter pulled up to clear some trees at the corner of the field in which he was working. He testified that he felt a cool spray mist hit his face and his eyes began burning.

3 CCR section 6614(b)(1) requires that the pesticide application not proceed when there is a reasonable possibility of contaminating a person's body or clothing who is not involved in the application. Mr. Ohlmer clearly saw the tractors working in an adjacent field. The wind direction would assist spray mist to move toward the adjacent field. The continuation of the application under these circumstances creates a reasonable possibility of contamination of the tractor drivers. Mr. Ohlmer believes he has the right of way and that the tractors should stop and wait for him to finish his aerial application. The regulation does not require such action but requires that the application stop.

Appellant alleged that there was no evidence that Mr. Valdez was contaminated. There was an unfortunate set of circumstances that led to the result that the CAC began its investigation into this May 4, 2005 incident on August 26, 2005. The CAC took no samples because it was not likely that pesticide residue would remain. Mr. Valdez had washed his clothing several times by that time, as well as his body. The hospital also did not take any samples that could be tested for pesticide residue. The CAC, and the Hearing Officer relied on Mr. Valdez' testimony, which was supported by the medical records which demonstrate Mr. Valdez was treated on May 4, 2005, for a corneal abrasion/burn and conjunctivitis, to determine that Mr. Valdez was contaminated. Mr. Valdez testified that he was sure the spray that contacted his face was from the helicopter. Mr. Ohlmer asserts that, "as commonly happens", Mr. Valdez either mistakenly thought he was sprayed, or was untruthful, especially in view of what Mr. Ohlmer considers contradictory statements. The Hearing Officer found Mr. Valdez's testimony to be credible and the Director is bound by that determination.

To establish a violation of section 6614(b)(1), it is not necessary to demonstrate that contamination occurred, only that a reasonable possibility of contamination was created. Caitlin

Lewis, Ernesto Valdez and Mr. Ohlmer all testified as to the relative positions of the parties in the two adjacent lots during the pesticide application. The hearing tape contained testimony during which the witnesses pointed to a map and indicated positions, movement of the parties and wind direction. Unfortunately, to the Director, the testimony sounded like “I was here”, “the helicopter was here”, “the tractor was here.” The Director relies on the Hearing Officer’s presence at the hearing and his ability to see where the witnesses pointed when he made the determination that the helicopter and tractor were working close enough together for the tractor to have been contaminated by pesticide spray. Therefore, the Director finds that substantial evidence in the record, in the form of Mr. Valdez’ testimony, Mr. Ohlmer’s testimony, and the wind direction evidence, support the Hearing Officer’s determination that a reasonable possibility of contamination occurred in violation of section 6614(b)(1).

Mr. Ohlmer alleged that he was not allowed to question the doctor to find out if there was any other reason for the corneal abrasion/burn diagnosis. There is no indication that Mr. Ohlmer requested the doctor attend the hearing nor that he attempted to talk to the doctor informally. He could have done so.

Mr. Ohlmer asserted that the County did not present evidence that he failed to take all precautions or that anything was wrong with his procedures. The Director disagrees. Mr. Ohlmer failed to follow the dictates of section 6614(b)(1) by failing to stop his application when there was a reasonable possibility of contaminating the tractor drivers.

As regards the fine level, the Hearing officer and CAC relied on Mr. Valdez’ testimony and the medical records to support the determination that an actual health hazard occurred, which justifies a Class A fine. The Director agrees with this conclusion. The CAC placed the fine level in the mid-range, \$2,500.00, based on the fact that Mr. Ohlmer has no prior violations. The Director finds that the fine class and level are supported by the record and within the discretion of the CAC.

### **Conclusion**

The commissioner's decision that Ted Ohlmer violated Title 3, section 6614(b)(1) is supported by substantial evidence. The commissioner’s decision to levy a fine of \$2,500 (Class A) is also supported by substantial evidence.

### **Disposition**

The commissioner’s decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$2,500 fine.

### **Judicial Review**

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA**  
**DEPARTMENT OF PESTICIDE REGULATION**

A handwritten signature in black ink that reads "Mary-Ann Warmerdam". The signature is written in a cursive style with a long horizontal flourish extending to the right.

11/13/06  
Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Mary-Ann Warmerdam, Director